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No. 85-1765

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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BANKERS LIFE AND CASUALTY COMPANY,
*Appellant*

v.

LLOYD M. CRENSHAW,
*Appellee*

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**On Appeal from the Supreme Court of Mississippi**

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## BRIEF OF THE MISSISSIPPI TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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## BRIEF OF THE MISSISSIPPI TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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### STATEMENT OF INTEREST

With the consent of the parties, the Mississippi Trial Lawyers Association (MTLA) respectfully submits this brief as amicus curiae in support of Appellee.[1]

The Mississippi Trial Lawyers Association is a voluntary association comprised of over 800 trial lawyers. The majority of its members practice frequently in both state and federal courts, regularly engaging in the representa-

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[1] Letters of both parties confirming consent are being filed simultaneously with this Court.

tion of individuals who have sustained bodily injury or property damage, and those who are victimized by consumer fraud. The MTLA, through its appropriate officers and committees, has authorized participation in this case as amicus curiae.

The Mississippi Trial Lawyers Association is particularly concerned with questions affecting the rights of litigants in federal and state courts in Mississippi and the preservation of the adversary system of justice. The majority of its voting members currently represent clients whose rights would be affected by the Court's opinion on the constitutional validity of Miss. Code Ann. Section 11-3-23 (Supp. 1986).[2]

The MTLA believes that it would substantially harm the appellate system in Mississippi if this statute were invalidated. Further, this Association believes that a ruling against the constitutionality of the statute would set a dangerous precedent which would radically alter principles of federalism that are the cornerstone of the system of justice in this country.

## SUMMARY OF ARGUMENT

Miss. Code Ann. Section 11-3-23 (Supp. 1986) serves important functions in the appellate system of the State of Mississippi: (1) it curbs abuses of Mississippi's automatic right of appeal to the Mississippi Supreme Court; (2) it protects the state court from meritless appeals that further contribute to an already staggering case load; and (3) it compensates appellees for the economic and emotional toll an appeal entails.

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[2] MTLA also agrees with Appellee and supporting amicus curiae that Mississippi state law authorizing punitive damages is not an unconstitutional exercise of the state's authority to devise remedies for particular types of harm and that the constitutional questions advanced against the punitive damages award are not properly before the Court. As this issue has been extensively briefed, we write separately to address 11-3-23 only.

The statute embraces purely state concerns and does not violate the United States Constitution because it is ratioanlly related to important state objectives. It applies equally to plaintiffs and defendants, the amount of the damages it authorizes compensates the successful appellee in a rational manner, and it targets those judgments where the incentive to appeal is high regardless of the merits. Indeed, this Honorable Court long ago recognized a state's right to impose a mandatory penalty on unsuccessful appellants. *Louisville & N.R.R. Co. v. Stewart*, 241 U.S. 261 (1916).

Both the Mississippi legislature and the Mississippi Supreme Court have recognized the vital role served by 11-3-23 in curbing abusive appeals and controlling Mississippi's staggering case load. Since the statute implicates no federal concern, this Honorable Court should not displace the state judicial and legislative judgment.

## ARGUMENT

### I. SECTION 11-3-23 IS A VALID EXERCISE OF MISSISSIPPI'S RIGHT TO ESTABLISH APPELLATE PROCEDURES.

Appellant has totally failed to establish even a threshhold showing that Mississippi's appellate damages statute should be subjected to equal protection scrutiny. Indeed, since Appellant cannot prove that access to Mississippi's appellate court has been arbitrarily denied to any discrete class of litigants, this state rule of procedure is a valid exercise of the legislature's authority to control the appellate process.

This Court has consistently recognized that a basic tenet of federalism requires each state to be charged with the authority "to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exer-

cise." *John v. Paullin*, 231 U.S. 583, 585 (1913). Because Miss. Code Ann. 11-3-23 (Supp. 1986) is a legitimate regulation of Mississippi appellate practice and procedure, and because it serves important state interests in curbing abusive appeals to an overburdened Mississippi Supreme Court, this Court should adhere to its long-standing rule that the federal court system will defer to the state's judgment on questions concerning the administration of their judicial systems. *Pennzoil Co. v. Texaco, Inc.*, —— U.S. ——, 107 S.Ct. 1519 (1987); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977).

**A. Background.**

Mississippi is one of few states that does not have an intermediate court of appeals. Moreover, although there is no guaranteed constitutional right to appeal,[3] the Mississippi legislature has decreed that the Mississippi Supreme Court, consisting of nine (9) justices, has appellate jurisdiction over all matters originating in any of Mississippi's lower trial courts, as well as numerous administrative agencies.[4] Thus, any Mississippi litigant who is dissatisfied by a decision of any lower tribunal may ap-

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[3] The right to appeal is not a fundamental right required by the Constitution. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The Mississippi Constitution guarantees the right to appeal only a decision of the justice court. Miss. Const. Art. VI, Sect. 171 (Supp. 1986).

[4] Mississippi's trial courts consist of 20 circuit courts, which preside over civil and criminal matters, and 20 chancery courts, which preside over equity proceedings, including domestic relations, guardianships, and the like. In addition, Mississippi has 17 county courts, 79 city courts, one family court, and numerous justice courts. Appeals from these inferior courts with limited jurisdiction are made in the first instance to the appropriate circuit or chancery court, with the Supreme Court being the court of last review. Similarly, parties aggrieved by administrative action may appeal to the Mississippi Supreme Court after having their appeal first reviewed by the appropriate circuit court. Mississippi Judiciary Directory and Court Calendar (Miss. Secretary of State, 1987).

peal as a matter of right to the Mississippi Supreme Court.[5]

While the legislative decision to allow appeals as of right is salutary in purpose, "an unfettered automatic right of appeal brings its own evils" and invites unsuccessful litigants to appeal merely "to squeeze a favorable settlement out of an impecunious plaintiff" and for other less laudable reasons. *Walters v. Inexco Oil Co.*, 440 So.2d 268, 275 (Miss. 1983).

As a result, the Mississippi Supreme Court's case load is staggering. As of December 31, 1986, the Mississippi Supreme Court had pending 1,131 cases.[6] Each of Mississippi's nine Supreme Court Justices authored on the average 65 written opinions in 1986.[7] Notwithstanding this valiant effort, there remains an average of approximately two years from date of judgment appealed from to decision by the Mississippi Supreme Court.[8] As this statistic includes summary affirmances without oral argument or written opinion, the true average for cases actually decided after the full adjudicatory appellate process approximates four years, as occurred in this case. In fact, some appellate decisions have taken as long as seven years.[9] Thus, "the greatest problem facing the [Mississippi Supreme Court] for the past number of years is the backlog of cases." [10]

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[5] Because of the State's economically depressed condition, no proposal for intermediate courts of appeals has been entertained seriously by the state legislature.

[6] Mississippi Supreme Court Annual Report, at 3 (1986).

[7] *Id.*, at 8.

[8] *Id.*, at 7.

[9] *Id.*

[10] "The Mississippi Supreme Court: A Justices' Profile", *Mississippi Lawyer*, May-June, 1987, at 9 (quoting Chief Justice Harry Gray Walker).

In the absence of intermediate courts of appeals, the Mississippi legislature devised a method to deter meritless appeals by the enactment of Miss. Code Ann. 11-3-23, which imposes additional damages, constituting 15% of the value of the underlying judgment, on an appellant who unsuccessfully appeals a money judgment or possessory action to the Mississippi Supreme Court.[11]

Prior to imposing the statutory damages on an unsuccessful appellant, there must be (1) a final judgment [12] (2) of the type specified by the statute,[13] which is (3) *unconditionally* affirmed [14] by (4) the Mississippi Supreme Court. The Mississippi legislature acted well within its

[11] Unlike interest, the 15% award is not calculated on a per annum basis; rather, it constitutes a one time, lump sum additional award only on the underlying judgment and not on any interest accruing during the appeal.

[12] The statute applies only when appellant has exercised his absolute right to appeal a final judgment. As an interlocutory appeal requires permission of the court, appellant is not solely responsible for the appeal; therefore, the statute is inapplicable to interlocutory appeals. *Canal Bank & Trust Co. v. Brewer*, 147 Miss. 885, 113 So. 552 (1927).

[13] The statute expressly applies to any judgment for (1) a sum of money, (2) possession of real or personal property, (3) dissolution of an injunction involving real or personal property, (4) the sale of property to satisfy a sum out of the proceeds of sale, and (5) enforcement or establishment of a lien, charge, or claim upon property.

[14] Any modification whatsoever will render the damages statute inapplicable. *See, Illinois Cent. R. Co. v. George*, 241 Miss. 233, 130 So.2d 260 (1961) (statutory damages not allowed where supreme court affirmed award of damages but reversed award of injunction); *Shipman v. Lovelace*, 215 Miss. 141, 144-45, 60 So.2d 559, 560-61 (1952) (statutory damages not awarded when appellant received some relief not previously granted); *Mississippi Hwy. Comm'n v. Burwell*, 206 Miss. 490, 497, 40 So.2d 263, 263 (1949) (statutory damages not awarded when affirmance is conditioned on a remittitur). In addition to unconditional affirmances, the statute likewise applies to appeals that are dismissed. Section 11-3-23.



authority in passing this state law to "curb abuses" of Mississippi's absolute right of appeal. *See, Walters, supra*, at 277. Thus, both the Mississippi legislature and the Mississippi Supreme Court have determined that 11-3-23 is necessary to curb appellate abuses.

**B. The Statute is Rationally Related to Valid State Objectives.**

Where, as here, a statutory regulation involves neither a fundamental right nor a suspect classification, state legislation is presumed to be valid. *See, McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The Court must uphold a legislative enactment if it serves any "plausible reason." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *McGowan, supra*, at 426 (statute may not be set aside "if any state of facts reasonably may be conceived to justify it."). By raising contrived and unproven imperfections in the sweep of the statute, Appellant would have this Court displace legislative judgment if any conceivable set of facts demonstrated any possible flaw in state laws concerning purely state matters. This may not be done.[15] Quite simply, the statute is eminently constitutional, both on its face and as applied.[16]

[15] As this Court has held, "[o]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960).

[16] Appellant cannot strongly contend that the statute is facially defective, as it applies to all unsuccessful appellants, whether plaintiff or defendant, who appeal from an order permitting recovery. *See, Wallace v. Jones*, 360 So.2d 932, 933-34 (1978) (upholding constitutionality of 11-3-23 on these grounds); *Pearce v. Ford Motor Co.*, 235 So.2d 281 (Miss. 1970) (applying 11-3-23 to unsuccessful plaintiff-appellant). Accordingly, Appellant must show the statutory damages are unconstitutional under the facts of this case.

In fact, the proposition that a state may impose a mandatory penalty on an appellant when a judgment is affirmed was established long ago. In *Louisville & N.R.R. Co. v. Stewart*, 241 U.S. 261 (1916), Justice Holmes, writing for a unanimous Court, held that a state's decision to make an appeal costly by imposing a 10% penalty, automatically assessed in all unsuccessful appeals, was justified where, as here, appellant was provided with a suspension of the judgment.[17] *Id.*, at 263. The application of 11-3-23 in this case was identical to the application of the Kentucky statute upheld in *Stewart*. In light of *Stewart*, 11-3-23 is a reasonable legislative enactment designed to serve Mississippi's vital interest in deterring meritless appeals.

**C. Appellant's Arguments are Devoid of Merit.**

Defendant summarily concludes that the appellate damages statute is unconstitutional for the following reasons: (1) it burdens Appellant's exercise of its right to appeal; (2) it is allegedly "overinclusive" and "underinclusive"; (3) it allegedly bears no relationship to costs incurred by

[17] Although this Court concluded in *Burlington Northern R.R. Co. v. Woods*, —— U.S. ——, 107 S.Ct. 967, 970 n.4 (1987), that "[t]he Mississippi statute applies without regard to whether the judgment has been stayed pending appeal," the only two decisions in which 11-3-23 was applied to unsuspended judgments involved special circumstances warranting the imposition of statutory damages. Since *Meek v. Alexander*, 102 So.2d 69 (Miss. 1924), involved partial payment made pursuant to an agreement that the money would be repaid in the event of reversal, appellee did not have unfettered use of even the partial payment, and imposition of statutory damages was appropriate. Similarly, *Tigner v. McGehee*, 60 Miss. 242 (1882), involved a judgment for foreclosure which, even though not stayed, constituted a cloud on the title of property that prevented appellee's right to dispose of the property. *See*, Miss. Code Ann. 11-49-1 *et seq.* (1972) (discussing state lis pendens procedures). In any event, this Appellant, who appealed with supersedeas, may not challenge the statute on the grounds that it may not be permissibly applied to judgments that are not stayed. *See*, n.16, *supra*.



the Appellee in defending the appeal; and (4) it allegedly treats litigants differently. Each contention is wholly without merit.

***1. The Statute Does Not Infringe Upon Appellant's Right to Appeal.***

Appellant relies solely on this Honorable Court's decision in *Lindsay v. Normet*, 405 U.S. 56 (1972),[18] which is totally inapplicable in this case for two reasons: the double bond requirement affected poor tenants and "foreclosed their right to appeal." *Id.*, at 79. In contrast, the appeal statute at issue in this case in no way infringes upon the ability of any party to appeal to the Mississippi Supreme Court, as it imposes no condition whatsoever that must be met prior to the appeal, in the absence of which the appeal will be barred.

Rather, the statute merely provides for payment of additional damages at the conclusion of the appeal. There has been absolutely no showing that 11-3-23 has barred any appeal by any party at any time. Even more importantly, the statute obviously did not deter this Appellant from taking its appeal to the Mississippi Supreme Court. Accordingly, this Appellant may not challenge the constitutionality of the appeal statute on these grounds.[19]

[18] *Lindsay* involved impoverished tenants who attempted to withhold rent until their dwellings were fit for habitation. Aware that Oregon law would have resulted in a bond requirement double the value of rents accruing during the pendency of appeal, and unable to afford same, the tenants filed a declaratory judgment action in federal court. In holding this condition for appeal invalid, the Court noted that "[t]he discrimination against the poor . . . is particularly obvious" and that the requirement foreclosed their right to appeal. *Id.*, at 79.

[19] As observed in *Myron v. Chicoine*, 678 F.2d 727, 730 (7th Cir., 1982), before bringing a constitutional challenge, "it is incumbent upon a litigant to demonstrate an injury which is real, not imaginary; concrete, not abstract; apparent, not illusory; and demonstrable, not speculative." *See also, Brockett v. Spokane Arcades, Inc.*,

### 2. *The Statute is Reasonably Tailored to Achieve Legitimate State Purposes.*

A state legislature is not held to the level of perfection in the enactment of its statutes. Thus, a state statute is not invalid because it is incomplete, because it affects more people than it should, or because it does not include every class of persons who are in need of regulation.[20] Indeed, this Court has long held that "the drawing of lines that create distinctions is peculiarly a legislative task and an unenviable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Such legislative action offends the equal protection clause only if it rests on grounds "wholly irrelevant to the achievement of the state's objective." *Lindsay, supra*, at 70.

The appellate damages statute responds to the necessity of "curbing abuses" of Mississippi's absolute right of appeal so that the Mississippi Supreme Court will be protected "from being required to spend its time and energy and resources on appeals thoughtlessly taken" and to "provide[e] a measure of compensation for the successful appellee . . . for his having endured the slings and arrows of successful appellate litigation." *Walters, supra*, at 274-77. Clearly, the statute bears a rational relationship to these objectives. Moreover, the statute applies to all appellants of money judgments, plaintiff and defendant, "rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness."[21] *See, Lindsay, supra*, at 70.

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472 U.S. 491, 501, 502 (1985); *Warth v. Seldin*, 422 U.S. 490 (1975).

[20] *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *Clements v. Fashing*, 457 U.S. 957, 971 (1982).

[21] In addition, the same persons or entities can be and often are both plaintiffs and defendants in the courts of Mississippi, and

Appellant argues that the statute is overinclusive because the damages may be imposed on "substantial" appeals. This is incorrect, however, for as previously demonstrated if an appeal is modified in any fashion whatsoever, then the appellant is deemed to have prevailed to such an extent that statutory damages will not be imposed.[22] While Appellant would obviously prefer to risk appeal, regardless of merit, to the Mississippi Supreme Court without incurring additional costs, the legislative decision to apply the statute in all cases of unsuccessful appeals is clearly a reasonable one in light of the Mississippi Supreme Court's heavy case load.[23]

Appellant also states that the damages statute is underinclusive "in that Mississippi does *nothing* to penalize the taking of frivolous appeals by plaintiffs who fail to secure money judgments at the trial level or who cross-appeal in an attempt to secure an even larger judgment."[24] Brief for Appellant, at 47 (emphasis in original). This statement is not only legally irrelevant to a determination of whether the statute bears a "rational

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while they may be subject to the damages provided by Section 11-3-23 in one case, they may reap its benefits or be exempt from it in others. This is particularly true of insurance companies who frequently defend claims against themselves or their insureds and prosecute subrogation cases.

[22] *See*, note 14, *supra*.

[23] *See*, text at nn.6-10, *supra*. A grant of exceptions from the strict, mandatory application of 11-3-23 would require the state to hold individualized hearings whenever a plea for exemption was made. Mississippi clearly has a rational basis for adopting a consistent rule applying to appeals of all money judgments. *Cf. Pennzoil Co. v. Texaco, Inc.*, —— U.S. ——, 107 S.Ct. 1519 (Stevens, J., concurring).

[24] The rationale for not imposing the statutory damages on a cross-appellant is based on the fact that the cross-appellant merely follows the case to the Supreme court and does not bring it there. *Ellis v. Merchants & F. Bank*, 193 Miss. 557, 10 So.2d 541, 541 (1942).

relation" to valid state objectives, but, in addition, is factually incorrect. In order to complement the appellate damages statute and provide for sanctions for the taking of any frivolous appeal, the Mississippi Supreme Court recently adopted Mississippi Rules of Appellate Procedure. Rule 38 of these Rules provides as follows:

> In a civil case to which Miss. Code Ann. Section 11-3-23 (Supp. 1986) does not apply, if this Court shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.[25]

Thus, if an appeal is of a money judgment or other judgment within 11-3-23, then either party who appeals may be subjected to statutory appellate damages. Similarly, if the appeal is of a type not covered by 11-3-23, then either party who appeals may be subjected to the frivolous appeal damages provided by Miss. R. App. P. 38. By promulgating this additional rule, and leaving intact 11-3-23, the Mississippi Supreme Court has again established the vital interest served by statutory damages and has concurred with the Mississippi Legislature's wisdom in taking steps necessary to curb abuses of the appellate process.[26]

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[25] Miss. R. App. P. Rule 38. The Comment to the Rule provides:

> Unlike Fed.R.App.P. 38, this rule applies only to civil appeals, and does not apply to criminal cases. The rule applies when an appeal is frivolous. There is no requirement that the appeal have resulted in delay.
>
> The damages to be awarded may include attorneys fees and other expenses incurred by an appellee. Interest is treated separately and is governed by Rule 37.
>
> This rule supplements and does not supplant the statutory 15% penalty now provided by Miss. Code Ann. Section 11-3-23 (Supp. 1986).

[26] The Appellate Rules, which were adopted on July 6, 1987, will become effective on January 1, 1988. In actuality, of course, neither the adoption of this Rule nor its absence at the time Appellant's

Moreover, the legislature was justified in determining that parties who have obtained a money judgment may be tempted to put the other party to the task of a lengthy appeal merely "to subject their adversaries to more costs and expense [and] to squeeze a favorable settlement out of an impecunious plaintiff." *Walters, supra,* at 275. Plaintiffs who have failed to obtain a verdict in their favor are not as likely to take an appeal for these reasons since, having lost at the trial court level, the pendency of an appeal would have minimal effect on their chances of securing a favorable settlement. Similarly, unlike an appellant who has been ordered to pay money or deliver property to the other party, a losing plaintiff in such a case does not retain on appeal anything that has been found to be owed to his adversary.[27] For these reasons, the legislature's decision to impose statutory damages only on parties appealing from money and similar judgments is a reasonable one.

The fact the Mississippi statute applies to all litigants, plaintiffs and defendants, who appeal from a money judgment is a critical distinguishing characteristic from the *Lindsay* double bond requirement which applied only to tenants. Indeed, two courts of appeals have relied upon this distinction in rejecting equal protection challenges to

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appeal was filed has any bearing on the constitutionality of 11-3-23. Indeed, had this Rule been in effect during the course of this appeal, it would not have altered the result in any way. In any event, however, the Mississippi Supreme Court has always had the inherent power to assess damages for frivolous appeals even in the absence of 11-3-23. *See, Newell v. State,* 308 So.2d 71, 76 (Miss. 1975) (Supreme Court has inherent power to promulgate procedural rules).

[27] Of course, the same potential "evils" discussed in *Walters* may apply to a successful plaintiff who, having obtained a money judgment, may feel he can "squeeze some more" out of defendant by challenging the adequacy of the verdict on appeal. For this reason, the statute applies to all appellants whether plaintiff or defendant. *See, Pearce v. Ford Motor Co.,* 235 So.2d 281 (Miss. 1970).

a double bond provision in the Commodities Exchange Act of 1936, 7 U.S.C. Sections 1 *et seq.* *See, Myron v. Martin*, 670 F.2d 49, 53 (5th Cir. 1982), ("[s]ince the double bond requirement applies equally to all persons whom the commission has ordered to pay a reparation award [the appellant] is not denied equal protection."); *accord, Myron v. Chicoine*, 678 F.2d 727 (7th Cir. 1982).

Since the double bond requirement at issue in *Martin* and *Chicoine* is constitutional, the Mississippi statute is likewise immune to challenge. This is especially true since unlike the double bond provision, 11-3-23 has no economic impact on the appellant until after the judgment has been unconditionally affirmed by the Mississippi Supreme Court.

The speciousness of Appellant's argument is also evident upon examination of the portions of the statute which were upheld in *Lindsay*. These provisions, which drastically limit the issues in unlawful entry and detainer actions and provide for only two to four days notice to the defendant prior to trial, were upheld as being rationally related to the state's interest in providing speedy trials in these actions.[28]

Moreover, because this Court has expressed a "minimal concern" with the outcome of the typical civil case involv-

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[28] *Lindsay, supra,* at 69-74. This Oregon statute, peculiar to FED actions, was upheld as rationally related to Oregon's legitimate interest in providing speedy trials since the landlord otherwise would suffer undeserved economic consequences from lengthy holdovers by tenants. However, the economic consequences suffered by landlords are no different from economic consequences suffered by many other types of appellees due to the delays inherent in our appellate system. Similarly, although Mississippi might have an interest in discouraging all meritless appeals (and in fact has adopted rules to this effect), it has acted well within its discretion in targeting those actions that have consequences peculiar to appeals of money judgments.

ing a monetary dispute between the parties,[29] the Mississippi legislature wisely responded to the needs of this state's judiciary by determining that unmeritorious appeals of money judgments should be subjected to statutory damages. Under binding Supreme Court precedent, the Mississippi legislature has acted well within constitutional parameters in treating appeals of money judgments and valuable property rights differently than it treats other causes of action.

### 3. *Statutory Damages are Rationally Related to Damages Sustained by Appellee on Appeal.*[30]

Appellant summarily concludes that 11-3-23 bears no relationship to its asserted purpose of providing "compensation" to the prevailing appellee. However, Appellant overlooks that the compensation which the Mississippi legislature has deemed to be appropriate includes not only damages for costs and attorneys fees but, more broadly, "compensation for his having endured the slings and arrows of successful appellate litigation." *Walters, supra*, at 274-75. An appellee loses more, much more, during a four-year appeal period than mere costs and attorneys fees. The economic reality is that Mississippi's statutory post-judgment interest of 8% was grossly insufficient to compensate Appellee for the fact that Appellant, during the appeal period of high interest rates, was in possession of what had been found after a full jury trial to be Appellee's property, i.e., its monetary damages.[31]

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[29] *Rivera v. Minnich*, 55 U.S.L.W. 5075, 5076 n.5 (June 25, 1987). *See also, Addington v. Texas*, 441 U.S. 418, 423 (1979).

[30] If this Honorable Court finds that 11-3-23 is rationally related to the state's interest in curbing abusive appeals, then it need not consider Appellant's argument that it bears no relation to the statute's compensation purpose, for this state legislation must be upheld so long as "any state of facts reasonably may be conceived to justify it." *McGowan, supra*, at 426.

[31] As noted in Appellee's Motion to Dismiss, the prevailing interest rates on money market accounts at the time the judgment was

Even more significant is the emotional toll an appeal takes on a litigant. Because this type of damage is particularly insusceptible of precise calculation, it becomes apparent that the state legislature is in the best position to determine how to compensate an appellee for this type of intangible damage. Recognizing that the actual damages sustained are not capable of mathematical precision, the state legislature reasonably elected to express these damages as a percentage of the judgment. In short, statutory damages contained in 11-3-23 are rationally related to the state's legitimate interest in providing compensation to an appellee who successfully defends his case on appeal.[32]

#### 4. *The Damages Statute Operates in an Even and Equal Fashion.*[33]

Appellant argues that, by virtue of 11-3-23, it and Appellee did not "enter the courts upon equal terms."

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entered was double the 8% post-judgment appeal rate provided in Miss. Code Ann. Section 75-17-7. Indeed, the Mississippi Supreme Court has recognized that "an aggregate of prevailing market interest rates and the annual inflation rate has greatly exceeded the 8% per annum legal rate of interest." *Walters, supra,* at 275. Moreover, this Honorable Court has recognized that "special statutory treatment" is appropriate when one litigant is in possession of property of the other litigant. *See, Lindsay, supra,* at 72.

[32] By suggesting that the statutory damages imposed in the case *sub judice* constitute "a penalty on a penalty," in effect, Appellant argues that statutory damages should not be awarded when the money judgment consists of punitive damages. Again, Appellant ignores both the economic and noneconomic harm suffered by an appellee during the pendency of an appeal. Moreover, the statute would be especially susceptible to challenge on equal protection grounds if it applied only to merely negligent defendants and exempted those appellants, such as Bankers Life, who have been found to be guilty of gross misconduct.

[33] Appellant argues that this Court should find 11-3-23 to be unconstitutional even if it is " 'reasonably tailored' to achieve the purposes of the statute as articulated by the court below" as it treats litigants differently. Brief of Appellant, at 48. Of course,

Brief of Appellant, at 48. This is absolutely untrue, for the statute clearly applies to all plaintiffs[34] and defendants who appeal from a money judgment or other type of judgment mentioned in 11-3-23.[35] Because it equally applies to all appellants of money judgments, the Mississippi Supreme Court upheld the statute on equal protection grounds over 25 years ago. *Wallace v. Jones*, 360 So.2d 932, 933-34 (Miss. 1960).

As previously established, all parties have an unburdened right to appeal to the Mississippi Supreme Court. In order to determine whether the statute applies equally, "we must look at the matter from the vantage point of the prospective appellant immediately after the rendition of the original judgment in the trial court." *See, Walters, supra,* at 277. When viewed in this manner, it is clear that both parties to a money judgment action may "enter the courts upon equal terms." *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 153 (1897).

On December 11, 1981, when the circuit court jury of Jackson County, Mississippi, rendered its verdict for

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once this Court has concluded that the statute is rationally related to legitimate state objectives, the inquiry ends, as the classification is then determined to be reasonable. *See, Lindsay, supra,* at 74.

[34] *See, Pearce v. Ford Motor Co.*, 235 So.2d 183, 183 (Miss. 1970); *Eagle Lumber & Supply Co. v. Robertson*, 161 Miss. 17, 165 So. 499, 500 (1931). Similarly, Defendants often "prevail" even though damages are awarded if the judgment is less than adequate to compensate the plaintiff for his injuries. When a judgment is rendered, the litigants stand on equal ground. It is the fact that a money judgment is awarded that brings the statute into play. If the judgment is inadequate, the plaintiff who appeals is subject to the same risks as the defendant, and he, too, must carefully weigh the chances that 11-3-23 damages will apply.

[35] *Rinaldi v. Yeager*, 284 U.S. 305 (1966), relied upon by Appellant, involved a state law that required only incarcerated criminal defendants to reimburse the state for transcript costs following an unsuccessful apeal. As 11-3-23 applies to all appellants of money judgment, *Rinaldi* does not support Appellant's contention.

money damages in this case, both the Plaintiff and the Defendant in the court below had the same right to exercise an appeal to the Mississippi Supreme Court. In addition, by virtue of 11-3-23, both Plaintiff and the Defendant faced the same risk in perfecting an appeal, which might be unsuccessful. Specifically, if Plaintiff were dissatisfied with the amount of the verdict and wished to appeal, then he would have known that he risked losing 15% of his damages if the appeal were unsuccessful. Defendant, in contemplating appeal, had to consider the same risk, that is that if its appeal were unsuccessful, it would be required to pay an additional 15% of the money judgment. Thus, the identical financial burden is imposed upon all parties who are involved in litigation resulting in a money judgment.

Appellant cannot credibly argue that on the critical date in question, that is the date the judgment was obtained, it was not on an equal standing with Appellee, for it clearly was. Rather, Appellant's real criticism is that it not only lost at the trial court level but, furthermore, the Mississippi Supreme Court found no merit in any of its assignments of error. Such dissatisfaction is not constitutionally protected.

In fact, if this Court finds that the statute is violative of due process [36] or equal protection, it will call into ques-

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[36] Defendant mentions the due process clause only in passing and has apparently foregone its argument that a hearing was required to determine the merits of his appeal prior to imposition of 11-3-23. The notice requirement of the due process clause was certainly met in this case as the statutory damages imposed by 11-3-23 are well known to all appellants, and the potential additional damages that may be incurred if the appeal is affirmed unconditionally is susceptible of precise calculation. As to the hearing requirement, Appellant received a full hearing before the nine Justices of the Mississippi Supreme Court, who held Appellant's appeal to be without merit. This hearing surely comports with the notice and hearing requirements and, in fact, is probably more process than is due.

tion every statute which assesses damages or a penalty based upon a percentage of the amount in controversy. Assessment of damages or penalties by percentages of the amount in controversy is relied upon in many state and federal statutes, including the United States Tax Code,[37] and we respectfully urge this Court to keep the door closed to challenges to state and federal statutes which authorize automatic assessment of a percentage of the money, or the value of the property at issue.

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[37] Among the statutes that would be particularly susceptible to challenge are penalties or damages relating to judicial proceedings, *see, e.g.*, Alabama Code Section 12-22-75 (1975) (automatic 10% penalty for unsuccessful appeal of money judgment); Arizona Rev. Stat. Ann. Section 12-2106 (1956) (authorizing damages for frivolous appeals of money judgments not to exceed 10% of judgment and not to exceed $500.00 in other cases); Or. Rev. Stat. Section 19.160 (1979) (automatic assessment of 10% penalty for appeal of money judgment without probable cause); Ky. Rev. Stat. Section 26A.200 (1985) (automatic 10% penalty assessed against all appeals of money judgments except first appeal); L.S.A.-R.S. 4203 (Louisiana statute authorizing interest on money judgment and tort action from date of judicial demand); Ga. Code Ann. Sections 5-6-6, 5-7-2 (appeal penalty of 10% of judgment); Va. Code Ann. 16-1-113 (Supp. 1986) (10% mandatory appeal penalty regardless of stay); Wisc. R. Civ. P. 809.25(3), 809.83(1) (authorizes maximum 10% penalty in addition to damages for delay and attorneys fees); Utah R. Civ. P. 73(1) (damages not to exceed 25% of judgment for frivolous appeal); workers' compensation statutes, *see, e.g.*, Miss. Code Ann. Section 71-3-107 (1972) (mandates double compensation benefits for minors illegally employed); Miss. Code Ann. Section 71-3-37 (1972) (automatic penalties for failure to timely pay worker's compensation benefits based upon 10% and 20% of money due); 33 U.S.C. Section 914 (similar provision in LHWCA); and taxation, *see, e.g.*, Miss. Code Ann. Section 27-35-45 (1972) (automatic penalty for failure to list property for tax assessment based upon 5% of value of property); 26 U.S.C. Section 6652 (authorizing penalty for failure to report tips as income in the amount of 50% of unreported amount unless due to reasonable cause); 26 U.S.C. Section 6653 (5% penalty and 50% of payable interest for negligent underpayment of taxes; 75% penalty and 50% of payable interest for fraudulent underpayment of taxes).

Any holding to the contrary would create more uncertainty and delays in the resolution of judicial disputes, a result which clearly should be avoided.

## II. CONCLUSION

Both the Mississippi legislature and the Mississippi Supreme Court have recognized on numerous occasions the necessity for a procedure to curb abuses of the automatic right of appeal. Moreover, both the legislative and judicial branches of our state have recognized the vital role played by 11-3-23 in meeting this interest.

This Honorable Court held long ago that a state was authorized to impose a mandatory penalty on unsuccessful appellants and that such a purely state procedure implicated no federal constitutional rights. *See, Stewart, supra.* This Honorable Court should not displace the judgment of the state branches of government particularly where, as here, the statute is applied equally and does not prevent access to Mississippi's appellate court.

Respectfully submitted,

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